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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JEFFREY ALLEN MAHLE, Defendant and Appellant.	E053328 (Super.Ct.No. BAF007086) OPINION

APPEAL from the Superior Court of Riverside County. Jean P. Leonard, Judge. Affirmed.

J. Peter Axelrod, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Gil Gonzalez, and Anthony Da Silva, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant, Jeffrey Allen Mahle (hereafter defendant), guilty as charged of attempted willful, deliberate, and premeditated murder (count 1); inflicting corporal injury resulting in a traumatic condition on a spouse (count 2); and assault with a deadly weapon, namely a baseball bat (count 3). The jury also found true the special allegations in connection with counts 2 and 3, that defendant inflicted great bodily injury on the victim within the meaning of Penal Code section 12022.7, subdivision (a),[1] and in connection with count 2 that defendant personally used a deadly weapon in the commission of the offense within the meaning of section 12022, subdivision (b). The jury also found true a special allegation that defendant had served a prior term in prison within the meaning of section 667.5, subdivision (b). The trial court sentenced defendant to serve an indeterminate term of seven years to life in state prison on count 1, his attempted murder conviction. The trial court imposed sentences on counts 2 and 3, but stayed execution of those sentences under section 654.

Defendant raises four claims of error in this appeal. First, he contends the trial court abused its discretion in denying his motion to discharge his attorney under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). Next, defendant contends the trial court committed reversible error when it failed to instruct the jury sua sponte on attempted voluntary manslaughter as a lesser included offense to the charged crime of attempted murder with premeditation and deliberation. Defendant's third claim of error is that there

[1] All statutory references are to the Penal Code unless indicated otherwise.

is insufficient evidence to support the jury's finding he committed the attempted murder with premeditation and deliberation. Finally, as a separate but related claim, defendant contends the trial court erred when it denied his motion for acquittal on the allegation that his act of attempted murder was willful, deliberate, and premeditated.

We conclude the trial court did not commit any of the errors about which defendant complains in this appeal. Therefore, we will affirm.

FACTS

The pertinent facts are not in dispute. Defendant hit his wife[2] six to 12 times with a baseball bat on the night of November 12, 2009. She was hospitalized for four days as a result of her injuries, which included fractures to her skull, a three-inch gash on her forehead, a broken right forearm, two lacerations on the crown of her head, bleeding on her brain, a swollen left knee cap, and an injury to the middle of her back. Defendant had been sick with bronchitis in the days leading up to the "incident." Defendant also had been taking Prozac for depression. His doctor had doubled the dose about five to six days before the incident. Defendant testified on his own behalf and stated, in pertinent part, that he did not remember what had happened other than that he had been sick and had gone to bed with his clothes on after coming home from his construction job. We will recount specific details of defendant's testimony, below, as pertinent to the issues he raises in this appeal.

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[2] Defendant's wife is the victim in all three counts. She is identified as Jane Doe in the reporter's transcript, although her name appears in some of the documents included in the clerk's transcript. We will refer to her only as defendant's wife.

The investigating police officer testified that he interviewed defendant's wife at the hospital.[3] She told him that defendant had come home from work and was resting on the couple's bed in their bedroom. They got into an argument. Defendant got out of bed to physically force her out of the room. She resisted because she wanted to get some of her things and leave with the children, all three of whom were in the bedroom.[4] Defendant threw her against the wall or the closet and then picked up a wooden baseball bat. He said, "I've had enough," or "I'm done with you [defendant's wife could not recall his exact words] but he said, ['] I'm going to be going away for a long time 'cause I'm done with you.['] And then he said he was gonna kill himself." Defendant's wife told the officer, "I begged him not to, and I tried to help him, and I told him I loved him, and I didn't want to call the police because I didn't want him to get in trouble, but, like, my head had such a big gash that I got scared 'cause I was dripping [blood], so I called my friends and I said[,] ['] please, take me to the hospital, but don't tell anybody. I'm going to say I got attached [*sic*] by somebody outside.[']" Defendant chased his wife around the house with the bat and asked her to give him some medication so he could kill himself. She asked him not to hit her and said she would not call the police. They could

[3] The jury heard the recording of that interview. We cite to the transcript of that recording.

[4] Two of the three children are defendant's wife's by a previous marriage. The third and youngest child is defendant's son, who was five years old at the time of the incident. That child's mother, defendant's previous wife, died in 2006.

just say that she got attacked outside. She asked him to help her with the wound on her head. Defendant said no, he "hated" her, and he was going to kill himself.

Defendant's wife told the police officer that she could not remember if defendant hit her other than when they were in the bedroom because she "started getting dizzy after the first hit," which she believed was the big one on her head, and then she tried to cover her face. She turned over and that is when defendant hit her on the arm, the back of the head, the back, the knees, and the legs. At that point she got up and ran because she got scared. While she waited for friends outside, she believed defendant was trying to kill himself in the bathroom. Several times during the interview, defendant's wife said that defendant was not acting like himself, he had never hurt her before, and that he had just been put on medication for depression.

At trial, defendant's wife testified, in pertinent part, that she still considered defendant to be her husband because the divorce "has not gone through." When asked what the status of her relationship with defendant was on the night of November 12, 2009, defendant's wife said, "It was perfect." At that time they were living in a "[b]eautiful four-bedroom, two-bath [house], big backyard. It was perfect. It was wonderful." According to defendant's wife, their life "was complete marital bliss." Defendant's wife testified that on November 12, 2009, she and the three children were in the bedroom with defendant so the kids could say good night to him. The youngest child did not want to leave and stayed in bed with defendant. Defendant's wife was trying to get the child to go to his own bed, but defendant let him stay. Defendant's wife, "in a

not-so-happy manner, said, 'Okay[] [f]ine,' and began to grab [her] purse and leave the bedroom to go sleep out in the living room." Defendant's wife grabbed her purse and told defendant she was leaving. Defendant's wife testified that the next thing she knew she was pushed against the wall, and she was being hit with the bat. She explained that she had put the bat in the bedroom and that it was on her side of the bed. The first blow hit her on the right side of her forehead. Then she put up her arms and tried talking to her husband. He kept hitting her with the bat. Defendant dropped the bat after his young son told him to stop and said, "'Please don't kill my mommy.'" Defendant's wife took the children with her to the living room. Before leaving the bedroom she looked in the bathroom. Defendant was standing there holding a knife to his throat.

Defendant's wife called a family friend and he took her to the hospital. She asked the friend not to call the police but to call 911 for her husband because she was afraid he was about to commit suicide. Additional pertinent facts will be recounted below.

DISCUSSION

1.

DENIAL OF DEFENDANT'S *MARSDEN* MOTION

Defendant contends he and his court-appointed attorney were embroiled in an irreconcilable conflict and as a result the trial court abused its discretion when it denied defendant's *Marsden* motion. We do not share defendant's view, for reasons we explain below. But even if we did, we would reject defendant's argument because he has failed to demonstrate prejudice.

A. Pertinent Facts

Two months before trial, defendant asked the trial court to appoint a new attorney to represent him. At the hearing on that motion, defendant complained that he had been in custody for 10 months and had been asking to go to trial but his attorney, Mr. Miranda, said there "are too many cases, that [defendant has] to wait in line for the other people." Defendant called Mr. Miranda's supervisor. Mr. Miranda told defendant that as a result of him calling his supervisor, Mr. Miranda would no longer be able to work with defendant. Defendant agreed "at this point in time, because he doesn't do anything but lie to me, he lied to my witness." Defendant claimed that all the delays in getting to trial were not fair to either his son or his wife, both of whom were waiting for defendant to come home.

Mr. Miranda explained to the court that he had tried eight cases in the past nine months, "[s]even of them, besides the one [he] did in front of the Court in January, have all been life cases, two of them being murders." Those cases date back to 2006 and 2007. Mr. Miranda "inherited" defendant's case after the preliminary hearing. He has been preparing the case for trial by interviewing witnesses, and exploring defendant's claim that he had been taking Prozac and was unconscious when he attacked his wife. Mr. Miranda consulted a toxicologist who said the unconsciousness defense was weak because defendant was intoxicated at the time of the attack. In addition, Mr. Miranda explained to defendant that the defense, even if viable, applied only to the specific intent crimes, but the charges against defendant included general intent crimes and

enhancements. Defendant wanted Mr. Miranda to contact another expert, but Mr. Miranda concluded that would not be beneficial because the toxicology report showed defendant was legally intoxicated at the time he attacked his wife. There also was no evidence in the tests that were done to support defendant's claim he had been taking Prozac. Mr. Miranda explained that he does not agree with the way defendant wants him to pursue the case and as a result they are "in essence, butting heads."

Mr. Miranda also explained what he viewed as the source of defendant's disagreement with him—the district attorney's offer to dismiss the attempted murder charge and to allow defendant to plead guilty to a crime that carries a determinate term of punishment. Mr. Miranda attempted several times to explain to defendant that such offers are rare in his experience. Mr. Miranda believed that his plea discussions with defendant were the source of defendant's disagreement and anger because defendant apparently felt that Mr. Miranda was trying to force defendant into accepting a plea agreement.

Mr. Miranda also acknowledged that "to a certain extent it has bothered [him]" that defendant called his supervisors, and their relationship has "broken down to a certain extent." He denied, however, that he was upset with defendant or that he had a red face when he came into court that morning, as defendant had claimed. The trial court denied defendant's motion to have Mr. Miranda removed as attorney of record.

B. Analysis

"'"The rule is well settled. '"When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result."' [Citation.] The decision whether to grant a requested substitution is within the discretion of the trial court; appellate courts will not find an abuse of that discretion unless the failure to remove appointed counsel and appoint replacement counsel would 'substantially impair' the defendant's right to effective assistance of counsel."' [Citation.]" (*People v. Vines* (2011) 51 Cal.4th 830, 878.)

In this case, defendant's dissatisfaction with his trial attorney stemmed from the delays in getting defendant's case to trial. Trial counsel explained the delay—he had other trials in cases that were older than defendant's case and therefore took precedence. Although defendant also claimed that he and his attorney had an irreconcilable conflict, defendant's attorney did not share that view. Trial counsel acknowledged that he was not happy that defendant had called his supervisor. However, in trial counsel's view their relationship had not suffered irreparable damage. Moreover, defendant has not demonstrated prejudice, i.e., that failure to remove his appointed attorney substantially

impaired defendant's right to the assistance of counsel. (*People v. Vines, supra*, 51 Cal.4th at p. 878.) Defendant has not identified any way in which trial counsel's representation of defendant was deficient. In fact, defendant effectively concedes this issue; he argues only that "[i]t is difficult to say what [trial] counsel might have done differently if he and [defendant] were able to work together." Because defendant has failed to show any way in which his right to the effective assistance of counsel was substantially impaired, we must conclude the trial court did not abuse its discretion by denying defendant's motion to remove his appointed trial attorney.

2.

SUA SPONTE DUTY TO INSTRUCT ON ATTEMPTED VOLUNTARY MANSLAUGHTER

Defendant contends the trial court had a sua sponte duty to instruct the jury on attempted voluntary manslaughter as a lesser included offense of the charged crime of attempted murder with premeditation and deliberation. We disagree.

A. Pertinent Facts

When asked at trial if she could remember how "this incident" started, defendant's wife said, "It was silly. I don't even know – I can't give you an exact reason because it was just about the children going to bed. It was unprovoked. Things were – I don't want to go too far, so – there was nothing that provoked it. It was a normal, typical night and – I don't know." An hour or two earlier, defendant's wife and defendant had what she described as a "silly" argument over the radio "because it was on secular music and [she]

. . . was upset . . . ." She felt the radio should be on a Christian station "because we were running a Christian home. And I was just being [me]. It was silly, in other words." Although she could not recall what defendant said, he made it clear that he was not going to change the station. Defendant's wife explained that defendant had been sick for about a week with bronchitis, that he had just gone back to work that day, and that she had been nagging at him all evening. Shortly before "this incident," defendant's wife had asked him whether he had made a counseling appointment for his son. She explained that the child needed to go to counseling and she was concerned that if he did not go, they would get in trouble and the child might be taken away from them. According to defendant's wife, "It wasn't really an argument. It was just me kind of telling him what he should be doing, which – me nagging, you know. I was concerned."

As previously noted, defendant testified at trial that he did not remember anything that happened from the time he got into bed until he heard his son screaming at him to stop, "it was like an alarm clock going off when you're sleeping, and . . . it's like I woke up and I'm standing above my wife [in the living room], and there's blood coming out of her head." The next thing defendant remembered was being in the bathroom. He was holding a knife to his throat and looking at himself in the mirror. His son was next to him again screaming for defendant to stop. Then everything went blank again, and the next thing defendant remembers is being in the hospital. Defendant did not recall his wife asking him about the music on the radio, the counseling appointment for his son, or the

exchange about his son staying in their bed. Defendant "absolutely" did not recall grabbing the bat and hitting his wife.

B. Analysis

"In criminal cases, even absent a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence. [Citation.] This obligation includes giving instructions on lesser included offenses when the evidence raises a question whether all the elements of the charged offense were present, but not when there is no evidence the offense was less than that charged. [Citation.]" (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085, citing *People v. Breverman* (1998) 19 Cal.4th 142, 154.)

"Voluntary manslaughter is a lesser included offense of murder when the requisite mental element of malice is negated by a sudden quarrel or heat of passion, or by an unreasonable but good faith belief in the necessity of self-defense. 'Only these circumstances negate malice when a defendant intends to kill.' [Citation.]" (*People v. Gutierrez* (2003) 112 Cal.App.4th 704, 708, citing *People v. Lee* (1999) 20 Cal.4th 47, 59.) "To establish voluntary manslaughter under a heat of passion theory, both provocation and heat of passion must be found. [Citation.] 'First, the provocation which incites the killer to act in the heat of passion case must be caused by the victim or reasonably believed by the accused to have been engaged in by the decedent. [Citations.] Second, . . . the provocation must be such as to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection.' [Citation.]" (*People v. Gutierrez, supra,* at pp. 708-709.)

Defendant contends the evidence set out above shows he and his wife had been arguing first about the counseling appointment, then about the secular music, and finally about defendant allowing his son to remain in their bed. Defendant contends these arguments, combined with his wife's act of picking up her purse and saying she was "leaving," constituted provocation. Defendant points out that he was a Baptist pastor[5] and that his wife implicitly challenged his devoutness by questioning him about the music; by asking him about the counseling appointment for his son, defendant contends his wife implicitly questioned his fitness as a father and parent; and by saying she was leaving, his wife threatened his marriage. According to defendant, these circumstances when combined with the fact that defendant "was ill, in bed and trying to relax would instill such heated passion and provocation that it 'would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection.'"

We do not share defendant's view that the facts establish he and his wife had been arguing prior to the assault. An argument requires an exchange of words; it is a debate of sorts. There is no evidence that defendant responded to his wife's questions about the music, the counseling appointment, or their son staying in their bed. At most, the evidence shows defendant's wife annoyed defendant by asking him questions when he was sick and trying to relax. But even if we agreed with defendant's characterization, the purported arguments, even when combined with the circumstance that defendant was

[5] Defendant became a pastor by studying with Set Free Ministries after he was convicted of embezzlement in 1996.

sick, do not rise to the level of sufficient provocation, i.e., provocation that would cause an ordinary person of average disposition to act rashly or without due deliberation.[6] (*People v. Lee* (1999) 20 Cal.4th 47, 59 [mere argument not sufficient provocation]; see also *People v. Gutierrez* (2009) 45 Cal.4th 789, 826–827 [cursing, scratching, and kicking the defendant not sufficient provocation]; *People v. Manriquez* (2005) 37 Cal.4th 547, 586 [calling the defendant "motherfucker" then challenging him to use weapon not sufficient provocation].)

In short, the evidence presented at trial was not sufficient to warrant instructing the jury on voluntary manslaughter based on heat of passion or sudden quarrel. We reject defendant's contrary claim.

3.

SUFFICIENCY OF THE EVIDENCE

Defendant contends the evidence set out above is insufficient to support the jury's finding that he acted with premeditation and deliberation. We disagree.

A. Standard of Review

"In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of

[6] The fact that defendant is a minister is irrelevant, because the standard is based on an ordinary person. Moreover, the fact cuts two ways in that a reasonable Christian minister could also be viewed as someone who would not easily get angry.

fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

B. Analysis

The trial court instructed the jury that "defendant deliberated if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant premeditated if he decided to kill before acting. [¶] . . . [¶] The length of time the person spends considering whether to kill does not alone determine whether the attempted killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration of the choice and its consequences is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of reflection, not the length of time."

Defendant cites the evidence that he assaulted his wife only a "couple seconds" after she said she was leaving. In defendant's apparent view, those few seconds were not enough time for him to premeditate and deliberate. But defendant also acknowledges the evidence shows he and his wife had "a number of disagreements/arguments" before he attacked her with the baseball bat. The jury could reasonably infer that over the course of

those disagreements defendant thought about killing his wife and made the decision to do so, but that he acted only after his wife said she was leaving. In addition, in her statement to the police defendant's wife reported that as he hit her on the head with the bat defendant said, "I'm going to be going away for a long time 'cause I'm done with you." That statement supports an inference that defendant had thought about what he was going to do before he did it. The noted facts are sufficient evidence to support the jury's finding that defendant acted with premeditation and deliberation when he attacked his wife with the baseball bat.

4.

MOTION FOR ACQUITTAL

Defendant contends the trial court was "misinformed" about the evidence the prosecutor presented and as a result abused its discretion when it denied his motion for acquittal on the premeditation and deliberation allegation. We will not discuss the particulars of this contention because it depends on the evidence otherwise being insufficient to support the allegation. We have addressed and rejected defendant's insufficiency of the evidence claim. Therefore, we will not address defendant's assertion that the trial court misunderstood the evidence and as a result erroneously denied defendant's motion for acquittal because even if we were to agree with defendant, the evidence nevertheless is sufficient to support the jury's true finding on that allegation.

DISPOSITION

The judgment is affirmed.

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MCKINSTER
J.

We concur:

HOLLENHORST
Acting P. J.

KING
J.